Opinion_Committee

From: Richard Hyde <richard.hyde@tceq.texas.gov>
Sent: Tuesday, November 03, 2015 4:15 PM
To: Opinion_Committee
Subject: Request For Opinion
Attachments: RESTORE OAG Request Final (Oct. 28).docx; Letter to Texas Governor Abbott.pdf; CPA Appropriated Fund 0174.pdf

RQ-0064-KP

To the Opinion Committee,
Pursuant to Government Code section 402.042(b)(2), I request an attorney general opinion on the questions presented in the attached letter sent by Commissioner Toby Baker on October 28, 2015. Thanks.
Richard

Richard A. Hyde, P.E.
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Texas Commission on Environmental Quality
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 28, 2015

FILE # ML-47851-15
I.D. # 47851

Via email to: Opinion.Committee@texasattorneygeneral.gov

Honorable Ken Paxton
Office of the Attorney General of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Opinion

Dear General Paxton:

Pursuant to section 402.042(b)(2) of the Government Code, I request an Attorney General opinion on the proper way to administer the expenditure of federal RESTORE Act dollars in Texas.

Background

In response to the 2010 Deepwater Horizon oil rig explosion that caused millions of gallons of crude oil to spill into the Gulf of Mexico, Congress enacted the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies (RESTORE) of the Gulf Coast States Act of 2012 (the "RESTORE Act").[1] As the name suggests, the Act's purpose is to restore and protect the natural resources, ecosystems, habitats, beaches, coastal wetlands, and economy of the Gulf Coast region. To accomplish this purpose, the Act established a new trust fund in the federal Treasury into which 80 percent of all administrative and civil penalties related to the spill must be deposited. P.L. 112-141 (H.R. 4348), § 1602(a)–(b) (2012) (establishing the "Gulf Coast Restoration Trust Fund" or "Trust Fund").

Currently, the RESTORE Trust Fund contains $800 million from an early settlement with Transocean, the company that owned the Deepwater Horizon rig. Another $4.4 billion from a settlement with BP, the company that operated Deepwater Horizon, will be deposited into the Trust Fund over fifteen annual payments beginning in 2017. The Trust funds must be expended according to a structure outlined in the Act that divides the money into five separate pots or "buckets." *See id.* §§ 1602–1605 (codified at 33 U.S.C. §§ 1321(t)(1)–(4)). Each Bucket governs a specified percentage of the Trust Fund and provides how and for what purpose each portion should be spent. *See* 33 U.S.C. § 1321(t)(1)–(4) (providing for the various buckets).

I have been appointed by Governor Abbott to oversee the implementation of the RESTORE Act in Texas and designated to represent the Governor on the federal RESTORE Council.[2] *See id.* § 1321(t)(1)(F)(iv), 1321(t)(2)(C)(iii), (t)(3)(B)(iii)(V) (assigning duties under the RESTORE Act to "the

[1]The RESTORE Act amended section 311 of the Federal Water Pollution Control Act. P.L. 112-141 (H.R. 4348), §§ 1601–1608 (2012) (codified at 33 U.S.C. § 1321).

[2]The RESTORE Act established the Gulf Coast Ecosystem Restoration Council ("Council") as an independent federal entity to develop and carry out a comprehensive restoration plan to be funded under one of the RESTORE Act buckets. 33 U.S.C. § 1321(t)(2)(A), (C). The Council consists of six federal agencies and the Governors (or their appointees) of Alabama, Florida, Louisiana, Mississippi, and Texas. *Id.* § 1321(t)(2)(C)(ii).

Office of the Governor of Texas or an appointee" of that office). In that role it is my responsibility, in conjunction with the Governor's office, to solicit, review, and ultimately select projects to submit to a federal agency[3] for RESTORE funding. This requires administrative processes designed to ensure projects in Texas are funded in a manner that complies with the Act as well as conditions and requirements imposed by U.S. Treasury Department regulations.

Project funding under the RESTORE Act occurs on a reimbursement basis. *See, e.g., id.* § 1321(t)(2)(E)(ii)(II) (providing that under bucket 2 Trust Fund monies shall be transferred to a Gulf Coast State "as the project or program is implemented"). This means that a project that has been selected and federally approved for funding does not actually receive any RESTORE dollars until after work has been performed, expenses incurred, and the federal government has approved the expenditure request. Also, the funds cannot go directly to a project proponent; they must first pass through the Governor or his appointee. *See, e.g., id.* § 1321(t)(1)(A), (F)(iv). To that end, we must "minimize the time between receipt of funds and the disbursement of those funds for authorized purposes." Treas. Reg. § 34.104 (2014) (governing all expenditures from the RESTORE fund).

During the most recent legislative session, the Legislative Budget Board included a rider to the General Appropriations Act in section 6.24 of Article IX providing in part that "(a) [f]unds related to the [RESTORE Act] shall be deposited to the State Treasury in a designated account to be determined by the Comptroller of Public Accounts." Act of June 20, 2015, 84th Leg., R.S., ch. 1281, art. IX, § 6.24 at IX-33. The initial draft of the rider also had language that would have required legislative approval for certain RESTORE Trust Fund expenditures in Texas. After becoming aware of the rider, the executive director of the RESTORE Council sent a letter to Governor Abbott expressing his concern that "subjecting [RESTORE] Trust Fund monies to the appropriations process of the Texas Legislature would appear to stand in contravention of the intent of the [RESTORE] Act."[4] This concern was based, in part, on the plain language of the RESTORE Act which clearly provides that "[a]mounts in the Trust Fund . . . shall be available for expenditure, *without further appropriation*, solely for the purpose and eligible activities of this subtitle and the amendments made by this subtitle," P.L. 112-141 (H.R. 4348), § 1602(c)(1) (2012) (emphasis added). He also emphasized that RESTORE funds "are not intended for use by the State in its sovereign capacity or for the general operation of State government." *Id.* Ultimately, the approval language in the rider was removed, but the RESTORE Council executive director's requirement that RESTORE funds not be subject to the legislative appropriation process is still relevant to the interpretation of remainder of the rider.

The Texas Comptroller of Public Accounts has established a RESTORE "Appropriated Account" within the state treasury and designated the Texas Commission on Environmental Quality (TCEQ) as the recipient.[5] Appropriating RESTORE funds through the General Appropriations Act, to an account within the state treasury and within an appropriation budget strategy at TCEQ, will subject RESTORE funds to appropriation during fiscal year 2016-17 and in the future. That would mean RESTORE funds would have to be included as appropriations in an existing agency's Legislative Appropriations Request and Operating Budget. Based on the letter from the executive director of the RESTORE Council, I am concerned that subjecting RESTORE Trust funds to these various appropriations mechanisms could violate the spirit and letter of the RESTORE Act. Further, it could hinder the Governor's ability to designate someone outside TCEQ as the state's RESTORE representative.

To date, Texas has not received any amount of money from the RESTORE Trust Fund. However, two Centers of Excellence selected under bucket 5 of the RESTORE Act have received award letters from Treasury, which means they are now able to begin work and submit invoices for reimbursement from the RESTORE Trust Fund. If Texas does not comply with all applicable state and

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[3]Under bucket 1, The Treasury Department must approve a Multi-year Implementation Plan submitted by the state that contains projects that have undergone a selection and review process at the state level. *See* 33 U.S.C. § 1321(t)(1)(H) (providing that no Gulf State may receive funding under bucket 1 unless Treasury determines that all applicable conditions have been met). The federal RESTORE Council chooses projects to fund under bucket 2, and approves projects contained in state expenditure plans under bucket 3. *See id.* § 1321(t)(2)(B), (C)(vii) (stating the purpose and duties of the RESTORE Council). For Centers of Excellence funded under Bucket 5, Treasury is responsible for awarding grants to the Gulf Coast States. Treas. Reg. § 34.701 (2014).

[4]Letter from Justin Ehrenworth, Executive Director, RESTORE Council, to Governor Greg Abbott at 1 (May 15, 2015) (attached).

[5]*See* https://fmcpa.cpa.state.tx.us/fiscalmoa/fund.jsp?num=0174 (attached).

federal laws, our ability to draw down federal RESTORE dollars for selected projects may be delayed or hindered. My questions, therefore, are as follows:

Questions Presented

1. Would implementing section 6.24(a) of Article IX of the Appropriations Bill violate federal law, including but not limited to the RESTORE Act provisions that assign Texas's duties under the RESTORE Act to "the Office of the Governor or an appointee of the Office of the Governor," and require that "[a]mounts in the Trust Fund . . . shall be available for expenditure, without further appropriation, solely for the purpose and eligible activities of this subtitle and the amendments made by this subtitle"?
2. If implementation of section 6.24(a) of Article IX of the Appropriations Bill would not violate federal law, can RESTORE Trust funds be administered through a trust or other account created by the Texas Comptroller of Public Accounts outside the state treasury?

Thank you for your consideration in this matter. Please do not hesitate to contact me if you have questions or need any additional information.

Sincerely,

Toby Baker
Commissioner, Texas Commission on Environmental Quality

/attachments

Opinion_Committee

From: Richard Hyde <richard.hyde@tceq.texas.gov>
Sent: Tuesday, December 22, 2015 1:44 PM
To: Opinion_Committee
Subject: RESTORE Questions
Attachments: OAG Opinion Response Brief (Dec 22).pdf; trustfundgraphic.jpg

To the Opinion Committee,

With regard to RQ-0064-KP, I would like to amend the questions presented in the brief attached to my original request email as follows:

1. Would implementing section 6.24(a) of Article IX of the Appropriations Bill violate federal law, including but not limited to the RESTORE Act provisions that assign Texas's duties under the RESTORE Act to "the Office of the Governor or an appointee of the Office of the Governor," and require that "[a]mounts in the Trust Fund . . . shall be available for expenditure, without further appropriation, solely for the purpose and eligible activities of this subtitle and the amendments made by this subtitle"?
2. Can RESTORE Trust funds be administered through a trust or other account created by the Texas Comptroller of Public Accounts outside the state treasury?

Note that the only change is the removal of the clause that was at the beginning of the second question.

Also, attached is (1) a brief submitted by Commissioner Toby Baker related to the request, and (2) a RESTORE Act graphic that is meant to accompany the brief.

Thank you and let me know if you have any questions or need additional information.
Richard

Richard A. Hyde, P.E.
Executive Director
TCEQ
512-239-3900

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 22, 2015

Via email to: Opinion.Committee@texasattorneygeneral.gov

FILE # RQ-0064-KP
I.D. # 47921

Honorable Ken Paxton
Office of the Attorney General of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Opinion

Dear General Paxton:

This brief is submitted in relation to RQ-0064-KP to address points made by the state Comptroller of Public Accounts in its brief of November 20, 2015. I very much appreciate the input of the Comptroller's office on this issue because that office will play a vital role in the proper disbursement of RESTORE Trust funds in Texas. That said, I disagree with the Comptroller's characterization of RESTORE Trust funds and how they should be treated under federal and state law.

The RESTORE Act is a complex federal grant program in which funding occurs on a reimbursement basis through specific processes outlined in both the Act and federal Treasury regulations.[1] This means funds are not paid out until work has been performed on projects that have already been selected and ultimately approved in some form by the federal government. From the federal Treasury, RESTORE Trust funds must flow quickly through the state to their intended purposes on the Gulf Coast. In this way the state itself is meant to be merely a conduit or temporary custodian in the actual disbursement of the funds. Therefore, RESTORE Trust funds allocated to Texas should not be appropriated but should be held as trust funds outside the state treasury as authorized under Government Code section 404.093(b)(2). This is consistent with both federal and state law, and it is the best and most efficient way to ensure that all requirements of the RESTORE Act are met while maintaining a high level of openness, transparency, and accountability for the funds.

I. Subsection 1602(c) of the RESTORE Act should be interpreted to apply to the expenditure of RESTORE Trust funds at both the federal and state level.

The Comptroller contends that subsection 1602(c), in which the "without further appropriation" language appears, applies only to the Secretary of the U.S. Treasury, not the state. Comptroller brief at 2. I disagree. Section 1602 governs the "Gulf Coast Restoration Trust Fund," and subsection 1602(c) governs expenditures of "amounts in the trust fund." Public Law No. 112.141 (H.R. 4348), § 1602(c)

[1]"[R]equirements for RESTORE Act grants are partly defined by the Act and Treasury's regulations, and partly by an extensive body of pre-existing requirements," such as the Office of Management and Budget Uniform Guidance. Preamble to the Interim Final Rule, "Department of the Treasury Regulations for the Gulf Coast Restoration Trust Fund," 31 CFR Part 34, sec. II. As I mentioned in my letter attached to the original opinion request, the RESTORE Act divides Trust Fund monies into five separate "buckets" and specifies how and by whom the money in each bucket should be disbursed. I have attached a helpful graphic of these buckets and will refer to them below. More information on the RESTORE Act and Treasury regulations can be found at www.restorethegulf.gov and https://www.treasury.gov/services/restore-act/Pages/default.aspx.

(2012). Nothing in section 1602 suggests that it applies only to the Secretary of the Treasury. The Comptroller even applies subsection 1602(c) to the state by pointing out that "the *state* is required to use [RESTORE Trust funds] '*solely for the purpose and eligible activities*' set forth in the RESTORE Act." Comptroller brief at 3 (quoting Public Law No. 112.141 (H.R. 4348), § 1602(c) (2012)) (emphasis added). Thus, subsection 1602(c) should be read to apply at both the federal and state level.

This construction makes sense when considering that the RESTORE funding process contemplates multiple expenditures of Trust funds. Under the RESTORE Act's various funding buckets funds are provided generally to the "Gulf Coast State," not directly to the ultimate grantee. *See, e.g.*, 33 U.S.C. § 1321(t)(1)(B)(i) (bucket 1), (t)(2)(E)(ii)(II) (bucket 2), (t)(3)(A)(i) (bucket 3). Under Treasury regulations, certain funds allocated to Texas are "provided directly to the Office of the Governor or to an appointee" before they are disbursed to the ultimate recipient. Treas. Reg. § 34.302(h) (2014); *see also id.* § 34.104 (requiring recipients of any RESTORE Trust funds to minimize the time between receipt of funds and disbursement for authorized purposes). Therefore, there are at least two expenditures of RESTORE Trust funds—first from Treasury to the state, and then from the state to the ultimate grantee.[2] Subsection 1602(c) requires that both expenditures be allowed to occur without a legislative appropriation.

Subsection 1602(c)(2) also requires that Trust Fund monies shall "remain available until expended, *without fiscal year limitation*." Public Law No. 112.141 (H.R. 4348), § 1602(c)(2). If subsection 1602(c) applies only at the federal level, as the Comptroller contends, then RESTORE Trust funds could be subject to fiscal year limitations once they are received by the state and then appropriated. This scenario is problematic in view of the process for receiving funds under buckets 1 and 3 of the RESTORE Act. Under buckets 1 and 3, the state must submit plans to the federal government for the use and expenditure of Trust Fund monies. 33 U.S.C. § 1321(t)(1)(E)(iv) (requiring a multiyear implementation plan for the use of funds under bucket 1), (t)(3)(B)(i) (requiring a state expenditure plan under bucket 3). These plans, which can cover multiple years, must be accepted or approved by the federal government before funds can be disbursed. 33 U.S.C. § 1321(t)(1)(E)(iv) (bucket 1), (t)(3)(B)(iv) (providing that the RESTORE Council must approve state plans under bucket 3). If funds committed to the state under a previously approved plan are appropriated once they are received by the state, they could become orphaned if not expended before the expiration of the appropriation. Such a result would turn the bucket 1 and 3 funding processes on their head, and effectively render subsection 1602(c) of the RESTORE Act meaningless.

The plain language of subsection 1602(c) evidences a clear congressional intent that RESTORE Trust funds be expended "solely for the purpose and eligible activities" under the Act. If, to effectuate that intent, Congress believed it necessary to prohibit appropriation and fiscal year limitation at the federal level, it could not have intended to then allow such action at the state level—especially if doing so could put the availability of some funds at risk. Furthermore, the Act establishes a clear process for the expenditure of RESTORE Trust funds that is inconsistent with a state legislative appropriation action. Under that process, federal and state actions are not separate, but intertwined. Therefore, subsection 1602(c)(2) should be read to apply to both.

Lastly, the Comptroller states that under federal law RESTORE Trust funds can be obligated or expended without further action by Congress. Comptroller Brief at 2. This is, of course, true because Congress specifically bestowed all of the decision-making and expenditure duties under the RESTORE Act upon non-legislative entities. No legislative body is given any decision-making authority over the expenditure of RESTORE funds. To be sure, nothing in the Act prevents the Texas legislature from imposing certain reporting or monitoring requirements on RESTORE Trust Funds. Such requirements are necessary, prudent, and, in fact, already in place. *See* General Appropriations Act (2016-2017), art. IX., §§ 6.24(b) (requiring any agency to notify the Legislative Budget Board of the intent to expend $ 1 million or more of RESTORE Trust funds), 7.10 (requiring quarterly reports on RESTORE Trust funds to the Legislative Budget Board). However, the RESTORE Act does not require legislative action in any of its prescribed funding processes.

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[2]There may be more than two expenditures of RESTORE Trust funds if the grantee uses RESTORE Trust funds to pay another entity to perform certain work in the implementation of the project. For example, one of the Centers of Excellence selected and awarded Trust funds under bucket 5 has issued a Request for Grant Applications for work to be performed under the Center's grant contract.

II. RESTORE Trust funds should be held outside the state treasury pursuant to the trust fund exception in Government Code section 404.092(b)(2).

Funds received by a Texas state agency "shall be deposited in the treasury." TEX. GOV'T CODE § 404.094(a). But that general requirement does not apply to "funds held in trust or escrow for the benefit of a person or entity other than a state agency." *Id.* § 404.093(b)(2). In its brief, the Office of the Comptroller offers a three-part test for determining if federal funds meet this trust fund exception. Comptroller Brief at 4. That test was established over many Attorney General Opinions relating to the receipt of federal funds by the state. *See, e.g.*, Tex. Att'y Gen. Op. Nos. DM-143 (1992) at 4, JM-300 (1985) at 2. The Office of the Governor addressed and applied the test in its brief to the Opinion Committee related to this opinion request. The Comptroller's office, however, does not apply the test. Instead, it relies exclusively on a footnote in Attorney General Opinion JM-772 to reach the conclusion that RESTORE Trust funds do not fit within the trust fund exception of section 404.093(b)(2). Comptroller brief at 4.

JM-772 concerns the federal petroleum overcharge program.[3] Tex. Att'y Gen. Op. No. JM-772 (1987) at 1. In footnote 3, the Attorney General concludes that funds disbursed to Texas under that program do not meet the trust fund exception because they are held "for the benefit of" a state agency, not because they fail the three-part test, which is not mentioned. *Id.* at 6, fn 3 (discussing the statutory predecessor to section 404.093 of the Government Code). The conclusion is based on certain aspects of the petroleum overcharge program that federal law requires. For instance, petroleum overcharge funds must be "used by the Governor as if such funds were received under one or more energy conservation programs" listed in the statute. Public Law No. 97-377, § 155(c) (1982). Also, the Governor must "identify to the Secretary [of Energy] *within one year after the time the disbursement* the energy conservation program or programs to which the funds are or will be applied." *Id.* (emphasis added). Because overcharge funds "were awarded to the state to be used for conservation programs," the footnote states, "[s]ome state agency will administer the programs for which the funds are used." Tex. Att'y Gen. Op. No. JM-772 (1987) at 6, fn. 3. Thus, the attorney general reasoned, "funds that are intended for a program to be administered by a state agency are funds held for the benefit of a state agency." *Id.* (emphasis added).

We cannot apply this fact-specific conclusion to RESTORE Trust funds because they are distinguishable from overcharge funds in several significant respects. In short, overcharge funds (1) may be disbursed to the state well before the ultimate recipient of those funds are known, (2) must be used to supplement a program administered by a state agency or commission with no geographic limitation, and (3) are subject solely to the discretion of the Governor, with few limitations imposed by federal law. RESTORE Trust funds share none of these characteristics.

First, RESTORE Trust funds are paid out on a reimbursement basis. *See, e.g.*, 33 U.S.C. § 1321(t)(2)(E)(ii)(II) (providing that bucket 2 funds shall be transferred to a Gulf Coast state "as the project or program is implemented"). This means they will not be transferred to the state, as discussed above, until specific project recipients have been selected, grant contracts have been entered into, and work has been performed. Once the funds are received, the state must "minimize the time between receipt of the funds and the disbursement of those funds for authorized purposes." Treas. Reg. § 34.104 (2014) (governing all expenditures of RESTORE Trust funds). In other words, RESTORE Trust funds remain in the U.S. Treasury until their ultimate recipient and purpose have been determined. And when they are disbursed they must flow through the state to the ultimate grantee as quickly as possible. This lies in stark contrast to petroleum overcharge funds, which are immediately transferred to the state and deposited in the state treasury before any uses or recipients of those funds must be determined and thus, constitutionally, require a legislative appropriation to be disbursed.

Second, RESTORE Trust funds are not intended to be used solely as a supplement for an existing program administered by a state agency. RESTORE Trust funds must go toward specific activities in a specifically defined area, described in the Act as the "Gulf Coast region"[4]. *See, e.g.*, 33 U.S.C. §

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[3]The petroleum overcharge program governs the allocation of amounts collected from oil companies in violation of the Emergency Petroleum Act. In Texas, chapter 2305, subchapter A of the Texas Government Code governs the administration of funds received under the program. Tex. Gov't Code §§ 2305.001—.075.

[4]The Gulf Coast region is specifically defined in the Act as the coastal zones as that term is defined under the Coastal Zone Management Act of 1972, or 25 miles from that zone. 33 U.S.C. § 1321(a)(33). A project could occur outside that zone if the overall benefit of the project accrues within the zone.

1321(t)(1)(B) (establishing purposes for Bucket 1 funds) & (t)(2)(D)(iii) (establishing purposes for Bucket 2 funds); *see also* Treasury Reg. §§ 34.201, .202(a), .203(c) (2014) (providing that activities funded under buckets 1 through 3 must be carried out in the Gulf Coast Region). They cannot be used to fund any general environmental project anywhere in the state, and they are certainly not intended for use by the state in its sovereign capacity or for the general operation of state government. Further, under buckets 1 through 3, the RESTORE Act does not specify the type of entity that is eligible to an award of funds. Thus, a private individual, an NGO, and/or a local governmental entity are all potential awardees of RESTORE Trust funds provided the funds go toward permitted uses.

Moreover, to the extent the RESTORE Act is a program in and of itself, nothing in the Act requires that a state agency administer it. For Texas, the Act does not limit or restrict who the Governor may appoint or designate to handle the state's duties under the Act. *See, e.g., id.* § 1321(t)(1)(F)(iv) (related to Bucket 1 funding). Thus, the appointee can be anyone—from a TCEQ commissioner to Willie Nelson. In my case, I was appointed in my official capacity as TCEQ commissioner so that agency resources could be deployed to facilitate the RESTORE Act before administrative funds were made available from the Trust Fund.[5] However, as but one of three TCEQ commissioners I am not authorized to unilaterally bind the agency into any action. Therefore, the TCEQ as an agency does not administer the RESTORE Act. Even if it did, the Governor could decide tomorrow to put Willie Nelson in charge of administering the RESTORE Act in Texas, and Mr. Nelson would have full access to RESTORE administrative funds to do it.

Third, it is not always clear or consistent in the various funding buckets within the RESTORE Act exactly who decides "precisely" where RESTORE Trust funds are ultimately granted. The state has discretion to select recipients of RESTORE funding under certain buckets, but no activity may be funded without some level of federal approval. As mentioned above, the RESTORE act requires the state to submit plans for the use and expenditure of Trust Fund monies allocated under buckets 1 and 3, which plans the federal government (U.S. Treasury and the RESTORE Council, respectively) must accept or approve before awarding funds. The entities responsible for developing the plans differ among the various states. In Texas it is the Governor or his appointee, while in Alabama it is the Alabama Gulf Coast Recovery Council, a consortium of several governmental entities and local elected officials. *Id.* § 1321(t)(1)(F)(i), (iv) (assigning duties under bucket 1) & (t)(3)(B)(iii)(I), (V) (assigning duties under bucket 3). By contrast, under bucket 2, the federal RESTORE Council has full discretion to select projects to fund based on projects submitted by the individual members. *Id.* § 1321(t)(2)(C)(vii). Treasury regulations also require that certain processes be followed when carrying out these statutory duties. In short, even when the state is given discretion to choose projects or activities to fund with RESTORE Trust funds, it must adhere to federal requirements and obtain federal approval before receiving any amounts.

The fact that the individuals who will ultimately benefit from RESTORE Trust funds are not as of yet identified is not dispositive.[6] It is true that the ultimate recipients of RESTORE Trust funds under buckets 1 through 3 (i.e., the project proponents that apply for funding) are not named in the Act, but those under bucket 4 (a special federal research program) and, to some extent, bucket 5 (centers of excellence) are specifically named. *See* Public Law No. 112-141 (H.R. 4348) §§ 1604 (creating a special federal research program for bucket 4 funding), 1605 (requiring the establishment of centers of excellence for bucket 5 funding). Either way, the simple fact that some of the ultimate funding recipients have not been identified should not be dispositive, for it did not prevent the Attorney General from concluding in a previous opinion that funds meant for yet-to-be-identified prisoners belonged outside the state treasury under the precodified version of the trust fund exception. *See* Tex. Att'y Gen. Op. No. MW-363 (1981)

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[5]The Act provides that three percent of amounts received under Bucket 1 may be used to cover administrative costs incurred in complying with the Act. 33 U.S.C. § 1321(t)(1)(B)(iii)(I); *see also* Treas. Reg. § 34.204(a) (2014) (pertaining to administrative expenses for available under buckets 1 through 3). Notably, the federal law governing the petroleum overcharge program specifically prohibits the use of funds disbursed under that program for "any administrative expenses of...any State, whether incurred in connection with any energy conservation program or otherwise." Public Law No. 97-377, §155(f) (1982).

[6]The Comptroller's office references this in its brief. Comptroller brief at 4. Footnote 3 of JM-772 observes that while the programs supplemented with petroleum overcharge funds "are intended to ultimately benefit individuals rather than agencies, the individuals who will ultimately benefit are as yet unidentified" and "[i]t is the responsibility of the state to identify precisely how the funds will be used and which individuals will benefit." Tex. Att'y Gen. Op. No. JM-772 (1987) at 6, fn. 3.

(involving a grant program which, incidentally, was administered by the Texas Department of Corrections—a state agency).

In sum, RESTORE Trust funds are not general federal funds. They are governed by a unique and unprecedented federal grant process that differs from the petroleum overcharge program in such significant and meaningful ways that the fact-specific conclusions of footnote 3 of JM-772 do not apply.

III. RESTORE Trust funds are already subject to extensive fiscal oversight.

The Comptroller makes a policy argument that depositing RESTORE funds into the state treasury will "assure that the money will receive greater fiscal oversight." Comptroller brief at 4-5. We do not object to reporting and greater transparency of RESTORE Trust funds, but the Comptroller's argument should be considered in full view of the federal and state oversight already built in to the RESTORE Act funding process.

Both the RESTORE Act and Treasury regulations subject recipients of Trust Fund monies to auditing, reporting, and monitoring requirements so numerous it would be tedious to list them all here.[7] In fact, we have already been audited by U.S. Treasury, even though the state has not yet received a single RESTORE Trust Fund dollar.

State law also requires reporting of RESTORE Trust funds expended in Texas. The General Appropriations Act requires notice to the Legislative Budget Board of any intention to expend $1 million or more of RESTORE Trust funds, and quarterly reports on various other aspects of RESTORE Trust funds. *See* General Appropriations Act (2016-2017), art. IX., §§ 6.24(b) (requiring notice of intent to expend $1 million or more of RESTORE Trust funds), 7.10 (requiring quarterly reports on various aspects of RESTORE Trust funds).

The Comptroller suggests that RESTORE funds belong in the state treasury so that "[s]ystem controls can be enabled to limit the types of expenditures that can be made from the fund." Comptroller brief at 5. This sentence is extremely problematic for reasons already stated in this brief, as well as the original opinion request and the letter from the executive director of the RESTORE Council. Again, RESTORE funding occurs on a reimbursement basis, so that by the time RESTORE funds are actually received by the state all relevant decisions have been made, grant contracts have been entered into, and work has been performed. Imposing limits or restrictions on the expenditure of RESTORE funds at that crucial moment would effectively negate the entire RESTORE funding process and/or delay project funding significantly.

Lastly, it is my understanding that funds held in a managed trust account created by the Comptroller would be subject to the same accounting requirements as appropriated funds. This means the funds would have to be managed using statewide accounting processes and adhering to state reporting requirements.

Conclusion:

Subsection 1602(c) of the RESTORE Act—requiring that RESTORE Trust funds be available for expenditure "without further appropriation" and "without fiscal year limitation"—applies to the expenditure of Trust funds at *both* the federal and state level. Therefore, funds made available to Texas under the RESTORE Act are not subject to appropriation by the Texas Legislature.

Further, RESTORE Trust funds awarded in Texas are intended to benefit the environment of the Texas coast and the citizens who live, work, and recreate there. RESTORE Trust funds are not general federal funds, nor are they held for the benefit of a state agency. Therefore, RESTORE Trust funds fit within the trust fund exception of Government Code section 404.093(b)(2) and should be held outside the state treasury.

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[7]For example, the RESTORE Act imposes certain auditing measures for funds received under bucket 1, and reporting requirements for funds received under bucket 2. 33 U.S.C. § 1321(t)(1)(E)(i) (bucket 1 audit requirement), (t)(2)(C)(vii)(VII) (bucket 2 reporting requirement). Treasury regulations subject the accounts and activities of bucket 1 fund recipients to Treasury audits, while also establishing reporting, recordkeeping, and auditing requirements for funds received under buckets 3 and 5. Treas. Reg. §§ 34.308 (2014) (Treasury audit authority under bucket 1), 34.506-.508 (reporting, recordkeeping, and auditing requirements under bucket 3), 34.706-.708 (reporting, recordkeeping, and auditing requirements under bucket 5).

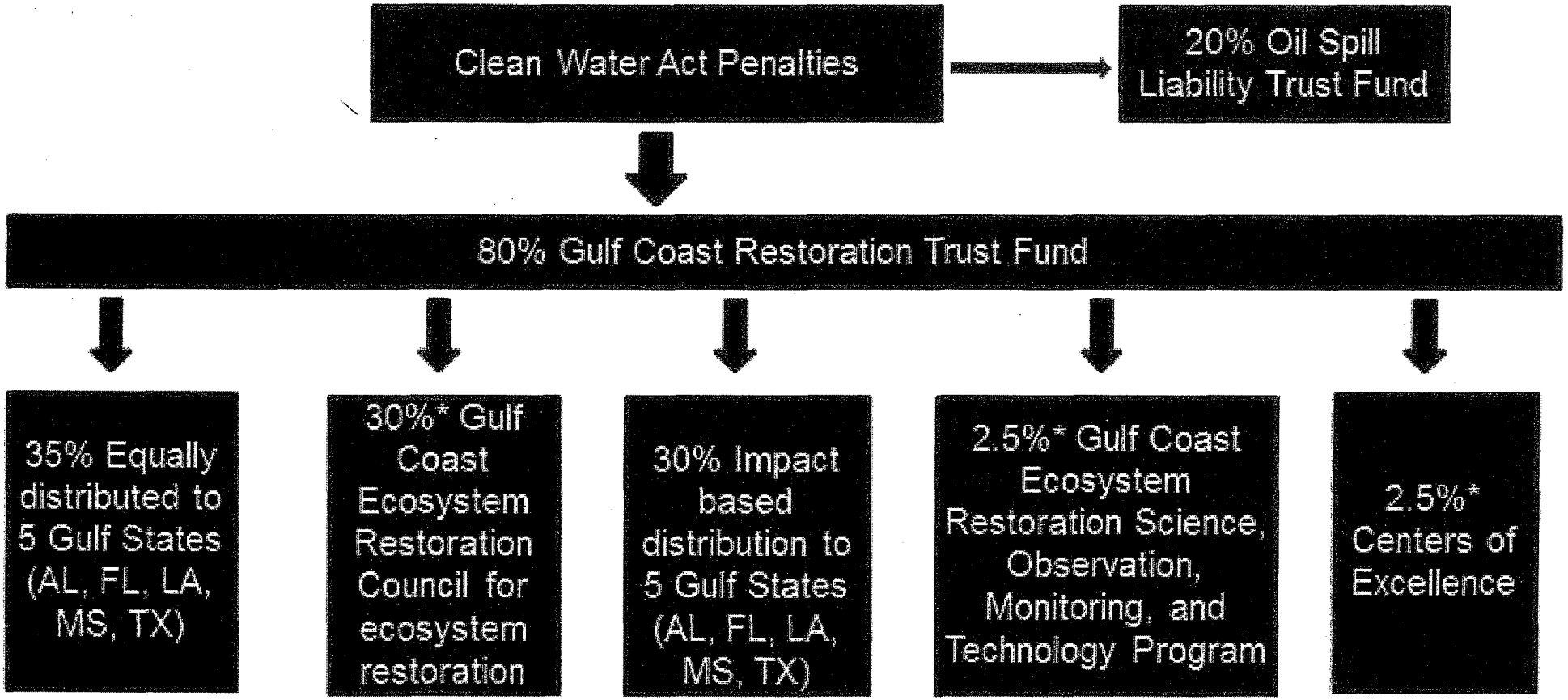
The funding that Texas will receive under the RESTORE Act presents a unique and unprecedented opportunity to restore and revive the coastal environment and economy, and so it is imperative that we get this right. Again, thank you for your consideration in this matter. Please do not hesitate to contact me if you have questions or need any additional information.

Sincerely,

Toby Baker
Commissioner, Texas Commission on Environmental Quality

/attachments

Allocation of Gulf Coast Restoration Trust Fund



***Supplemented by interest generated by the Trust Fund (50% to Gulf Coast Ecosystem Restoration Council, 25% to Science Program, 25% to Centers of Excellence)**